

**UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA**

Donnell Thomas,  
Plaintiff  
-vs-  
Wexford Medical, et al.,  
Defendants.

CV-15-0394-PHX-JJT (JFM)

**Report and Recommendation**

On August 18, 2015, the Court construed Plaintiff's Motion for Default Judgment (Doc. 54) as a motion for entry of default. The Court granted that motion, directed the Clerk to enter default against Defendant Nwaohia, the sole remaining defendant, and gave Plaintiff 14 days to move for default judgment against Nwaohia. (Order 8/18/15, Doc. 55.) That deadline passed, and Plaintiff did not move for entry of default judgment or otherwise respond.

Accordingly, on September 9, 2015, the Court issued its Order to Show Cause (Doc. 57) noting Plaintiff's failure to pursue default judgment, and directing Plaintiff to show cause within 14 days why this case should not be dismissed for failure to prosecute. Plaintiff has not responded.

Plaintiff has the general duty to prosecute this case. *Fidelity Philadelphia Trust Co. v. Pioche Mines Consolidated, Inc.*, 587 F.2d 27, 29 (9th Cir. 1978). Rule 41(b) of the Federal Rules of Civil Procedure provides that "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action."

In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-31 (1962), the Supreme Court recognized that a federal district court has the inherent power to dismiss a case *sua sponte* for failure to prosecute, even though the language of Rule 41(b) of the Federal Rules of Civil Procedure appears to require a motion from a party. Moreover, in

1 appropriate circumstances, the Court may dismiss a complaint for failure to prosecute  
2 even without notice or hearing. *Id.* at 633.

3 In determining whether Plaintiff's failure to prosecute warrants dismissal of the  
4 case, the Court must weigh the following five factors: "(1) the public's interest in  
5 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk  
6 of prejudice to the defendants; (4) the public policy favoring disposition of cases on their  
7 merits; and (5) the availability of less drastic sanctions." *Carey*, 856 F.2d at 1440  
8 (*quoting Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)). "The first two of  
9 these factors favor the imposition of sanctions in most cases, while the fourth factor cuts  
10 against a default or dismissal sanction. Thus the key factors are prejudice and  
11 availability of lesser sanctions." *Wanderer v. Johnson*, 910 F.2d 652, 656 (9th Cir.  
12 1990).

13 Here, the first, second, and third factors favor dismissal of this case. Plaintiff's  
14 failure to respond to the Court's orders and to pursue his claims against the sole  
15 defendant prevents the case from proceeding in the foreseeable future. The fourth factor,  
16 as always, weighs against dismissal.

17 The fifth factor requires the Court to consider whether a less drastic alternative is  
18 available. Given Plaintiff's apparent abandonment of the case, certain alternatives are  
19 bound to be futile. The Court finds that only one less drastic sanction is realistically  
20 available. Rule 41(b) provides that a dismissal for failure to prosecute operates as an  
21 adjudication upon the merits "[u]nless the court in its order for dismissal otherwise  
22 specifies." In the instant case, a dismissal with prejudice would be unnecessarily harsh.

23 The Complaint and this action should, therefore, be dismissed without prejudice  
24 pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

25 **IT IS THEREFORE RECOMMENDED** that, pursuant to Rule 41, Federal  
26 Rules of Civil Procedure, this case be **DISMISSED WITHOUT PREJUDICE** and the  
27 Clerk of the Court be directed to enter judgment accordingly.  
28


**EFFECT OF RECOMMENDATION**

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to *Rule 4(a)(1), Federal Rules of Appellate Procedure*, should not be filed until entry of the district court's judgment.

However, pursuant to *Rule 72, Federal Rules of Civil Procedure*, the parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. Thereafter, the parties have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any findings or recommendations of the Magistrate Judge will be considered a waiver of a party's right to *de novo* consideration of the issues, *see United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003)(*en banc*), and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the recommendation of the Magistrate Judge, *Robbins v. Carey*, 481 F.3d 1143, 1146-47 (9th Cir. 2007).

Dated: September 30, 2015

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James F. Metcalf  
United States Magistrate Judge